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No. 05-____

IN THE
Supreme Court of the United States

REGIONS BANK, GUARDIAN OF THE ESTATE OF
KIMBERLY RENE SMITH

Plaintiff/Appellant

v.

BMW NORTH AMERICA, INC. AND BMW AG,

Defendants/Appellees.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether judgment resting upon a general verdict may be affirmed despite legal error at trial where it cannot be determined whether the jury relied upon the legal error in rendering its verdict.

PARTIES TO THE PROCEEDINGS

Kimberly Renea Smith was the plaintiff below in the district court and is a citizen of Arkansas. Regions Bank subsequently became legal guardian of the estate of Kimberly Smith and was substituted as plaintiff. Regions Bank has its principal place of business in Arkansas.

BMW North America, Inc. and BMW AG, defendants below, are citizens of Delaware and New Jersey and Germany, respectively.

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**On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Regions Bank respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. at 1a) is reported at 406 F.3d 978 (8th Cir. 2005). That court's denial of Petitioner's motion for rehearing or rehearing *en banc* (App. at 7a) is unpublished. A prior decision by the Eighth Circuit in this case is reported at *Smith v.*

BMW North America, Inc., 308 F.3d 913 (8th Cir. 2002).¹

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 9, 2005. A motion for rehearing and rehearing *en banc* was denied on June 24, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2111 provides:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

Kimberly Renea Smith was severely injured when she lost control of her BMW 318i on a road through a mountainous part of North Arkansas. Smith's car left the road, hit an embankment, rolled over onto its roof, and eventually came to rest. App. at 1a. The driver airbag failed to deploy. Although she was wearing her seatbelt, Smith suffered a broken neck in the accident, 308 F.3d at 917. She will remain a quadriplegic for the rest of her life.

¹ Regions Bank was substituted as plaintiff after it became Ms. Smith's legal guardian.

Smith brought suit against BMW, alleging that its airbag was defective and that BMW was negligent in marketing an uncrashworthy car. App. at 3a-4a. BMW argued that the car did not crash into the hillside with sufficient front-end force to trigger the airbag. In addition, BMW argued that Ms. Smith was contributorily negligent.

Prior to trial, Smith moved *in limine* to exclude evidence of tests of her blood serum alcohol level after the accident. App. at 2a. Smith argued that her level of intoxication was entirely irrelevant to whether the airbag should have deployed upon impact with the hillside. If the jury found, as BMW argued, that the initial impact was not a deployable event, BMW would not be liable and there would be no fault to compare against Smith's. Moreover, evidence that Smith was driving while intoxicated would be highly prejudicial, inviting the jury to decide the case on an improper basis and without regard to the evidence. See *Brief of Appellant, Regions Bank v. BMW North Am. Inc.*, 406 F.3d 978 (8th Cir. 2005) (No. 04-2273), at 20-21 & 26. After a hearing, the district court denied Smith's motion. App. at 2a.

At trial, the defense presented four witnesses, all of whom were experts. Over Plaintiff's objection, Dr. Henry Simmons testified for approximately one hour and fifteen minutes concerning Ms. Smith's alcohol consumption. He surmised that Ms. Smith was a "problem drinker." *Brief of Appellant* at 9. He stated that a typical person with that level of alcohol in her blood would be emotionally unstable, having decreased inhibitions, having reduced ability to make critical judgments, having impaired memory, having impaired ability to understand information, and having decreased response time and muscular

coordination. App. at 3a. During closing argument, defense counsel emphasized that Smith's intoxication was "a highly significant fact which can explain everything that happened in this accident." See Brief of Appellant at 10.

The trial judge instructed the jury that if they determined that BMW was without fault, or that Smith's fault was greater than or equal to BMW's fault, Smith was not entitled to recover any damages. Regarding intoxication, the district court instructed that it was unlawful under Arkansas law for a driver with a blood alcohol level of .10 percent or greater to operate a motor vehicle. Violation of this statute would constitute evidence of negligence to be considered along with all of the other evidence in the case. App. at 4a.

The jury found for BMW returning a general verdict form which stated, in its entirety: "We, the jury, find for the defendants." App. at 5a.

Plaintiff appealed to the Eighth Circuit, arguing that applicable Arkansas law would exclude evidence of a driver's intoxication as irrelevant and unfairly prejudicial in a crashworthiness case alleging a defect in the passive restraint system.² Brief of Appellant at 14-26. The court of appeals did not reach this issue, but held that any error on this score did not warrant reversal. App. at 5a.

"It is possible," the court below acknowledged, "that the jury reached this verdict by assigning fault

² To the extent no existing precedent of the Arkansas Supreme Court controls this issue, Rule 6-8 of the rules of the Supreme Court and Court of Appeals of the State of Arkansas authorizes the court to answer certified questions from any court of the United States.

to Smith on the basis of her alcohol consumption, comparing her fault to BMW's fault, and concluding that Smith's fault was equal to or greater than BMW's fault." App. at 5a. Assuming the introduction of evidence of Smith's intoxication was erroneous, the error was clearly one affecting her substantial rights. See 28 U.S.C. § 2111. That evidence was the sole and entire basis for BMW's contributory negligence defense.

However, the court continued,

[T]here are two other possibilities *that are at least as likely*, neither of which rests on the evidence of Smith's blood alcohol content. First, BMW put on evidence at trial from which the jury could reasonably conclude that there was no defect or negligence because the force and direction of the car's impact into the hillside were insufficient to trigger deployment of a properly operating driver's-side frontal-impact airbag. Second, BMW put on evidence at trial from which the jury could reasonably conclude that Smith's injuries occurred during the rollover-when deployment of the airbag would not have helped.

App. at 6a (emphasis added).

"We have no way of determining from this general verdict why the jury found [BMW] not liable," the court concluded. App. at 5a. Because Smith was unable to prove which issue formed the basis of the jury's decision, "we can only speculate whether . . . plaintiff's substantial rights were